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No. 94-688

In the
Supreme Court of the United States
October Term, 1994

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, AND ROY E. GRIFFIS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

RESPONDENTS' BRIEF IN OPPOSITION

STANLEY P. JOHNSTON
Deputy General Counsel
(Counsel of Record)
DAVID HUDSON
General Counsel
OKLAHOMA TAX COMMISSION
P.O. Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141
Counsel for Respondents

QUESTION PRESENTED

Where a "plain, speedy and efficient remedy" is available under state law for Commerce Clause or other Constitutional or federal law challenges to state tax laws, and, as in this case, that state law remedy was successfully pursued, are the state courts, in view of the principles of federalism and comity, *required* by federal law to entertain a coextensive claim under 42 U.S.C. §§ 1983 and 1988?

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Oklahoma Supreme Court of which Petitioners seek review, was rendered *sub nomine Private Truck Council of America, Inc. v. Oklahoma Tax Com'n*, and is reported at 879 P.2d 137 (Okla. 1994).

ADDITIONAL STATUTORY PROVISIONS

In addition to the Constitutional and statutory provisions cited by Petitioners, the following federal and state statutes are involved:

The Tax Injunction Act, 28 U.S.C. § 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

OKLA. STAT. tit. 68, § 226 (1981), which provides a right of action and affords a remedy to taxpayers who wish to challenge any state tax law or its enforcement as an unlawful burden on interstate commerce or violative of Acts of Congress or the United States Constitution, is set out in full in the Appendix to this Brief, at 1a.

STATEMENT OF THE CASE

Petitioners (plaintiffs below) initially brought this action in state district court pursuant to OKLA. STAT. tit. 68, § 226 (1981) to recover taxes paid under protest, which taxes plaintiffs charged were violative of the Commerce Clause.[1] In Count III of their state court petition, plaintiffs alleged that the actions of the defendants[2] in collecting the taxes imposed by the challenged statutes were "taken under color of state law," and that defendants, Respondents here,

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[1] U.S. Const. art. I, § 8, cl. 3.

[2] The original defendants were the State of Oklahoma, the Oklahoma Tax Commission, the Commissioners of the Tax Commission, both individually and in their official capacities, and the State Treasurer. The action was later dismissed as to the State, the State Treasurer, and the Tax Commissioners as individuals.

were therefore "liable" under 42 U.S.C. § 1983.[3] The plaintiffs thus sought attorney fees under 42 U.S.C. § 1988.

Defendants argued in favor of the statutes' constitutionality, and also challenged the plaintiffs' claim for attorney fees in a two-fold argument: (1) that a § 1983 claim could not be brought on Commerce Clause grounds; and (2) that a § 1983 claim is not cognizable in state court where a complete and adequate remedy (such as 68 O.S. 1981, § 226) is provided under state law to redress the plaintiffs' substantive claim.

The trial court upheld the tax statutes' constitutionality under the Commerce Clause, and also dismissed plaintiffs' § 1983 claim. That dismissal was based upon the court's conclusion that the Commerce Clause would not support a claim under § 1983.

On appeal, the Oklahoma Supreme Court reversed the trial court as to the constitutionality of the taxing statutes, holding them violative of the Commerce Clause, and ordered partial refunds.[4] That court agreed, however, that plaintiffs were not entitled to attorney fees, also upon the grounds that, under then extant jurisprudence, a § 1983 claim could not be maintained on Commerce Clause grounds. As with the trial court, although the existence and adequacy of the state-law remedy as grounds for dismissal of a § 1983 claim had been briefed on appeal by the Oklahoma Attorney General and by the Tax Commis-

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[3] No damages or relief were sought under § 1983, either in the form of declaratory or injunctive relief, or as refunds. Those remedies were available, and invoked, under state law, *ie.*, 68 O.S. § 226.

[4] 806 P.2d 598 (Okla. 1990).

sion, that issue was not addressed in the Oklahoma court's opinion.

Subsequent to the Oklahoma Supreme Court's decision on June 28, 1990, this Court ruled in *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865 (1991), that suits for violations of the Commerce Clause *may* be brought under § 1983. As a result, on plaintiffs' petition for certiorari, this Court vacated the Oklahoma Supreme Court's opinion and remanded for further consideration in light of *Dennis*.[5]

On remand, the Oklahoma court recognized this Court's holding in *Dennis*, and acknowledged that, pursuant thereto, Commerce Clause violations do indeed provide a basis for the bringing of a § 1983 action. 879 P.2d at 138, 140, Pet.App. 1a, 5a. The court, however, went on to examine the pertinent issue of this case, which was not involved in *Dennis*: Are the state courts *required* to entertain such actions where, as here, a "plain, speedy and efficient remedy" is available—and successful—under state law?

The Oklahoma court first found—and Petitioners here do not challenge such conclusion—that Oklahoma law provides an adequate state remedy affording the relief the plaintiffs requested. 879 P.2d at 138, 139, Pet.App. 1a, 4a. Consequently, under the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, a federal court would be prohibited from entertaining Petitioner-plaintiffs' claim. *Id.*, at 138, Pet.App. 2a–3a. Thus that court, while acknowledging

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[5] In issuing such a summary reconsideration order, this Court told the Oklahoma court to reconsider the case "in light of the intervening precedent—which may or may not compel a different result." Robert L. Stern, et al., *Supreme Court Practice* 250 (7th ed. 1993).

that state courts have *jurisdiction* to consider § 1983 claims, found that the determinative issue in this case was whether, under principles of federalism and comity, the state courts were required to *exercise* that jurisdiction when tax challengers could receive constitutionally adequate relief under state law. *Id.*, at 140–142, Pet.App. 6a–11a. After reviewing the decisions and rationale both of this Court and of those state court decisions which considered *that* question—and those which did not—the court held that, under those principles, the exercise of such jurisdiction was not required under these circumstances. *Ibid.*

Accordingly, the court below found that plaintiff-petitioners had been afforded a plain, speedy and efficient remedy under state law which was adequate for 14th Amendment due process purposes, and that this Court's decision in *Dennis v. Higgins*, under these circumstances, did not compel a different result in this case. As the court said, "[a]lthough the reasons for so doing have changed," the trial court (and the Oklahoma Supreme Court) "reached the right result in declining to grant an attorneys' fee under §§ 1983 and 1988." *Id.*, at 142, Pet.App. 10a–11a. The prior judgment was reinstated. *Ibid.*

As will be shown, that decision is consistent with applicable decisions of this Court, and does not conflict as to any federal question with the applicable decisions of the highest courts of other states. Further review by certiorari is unwarranted, and should be denied.

REASONS FOR DENYING THE WRIT

This case is about attorney fees—nothing else. Contrary to Petitioners' claim, the Oklahoma Supreme Court in its opinion below did *not* rule, contrary to *Dennis v. Higgins*,

that suits for violation of the Commerce Clause could not be brought under § 1983. Rather, on remand, and as dictated by *Dennis*, that court specifically recognized that they could. Then, however, the court below examined the applicable decisions of this Court and those decisions of the state courts of last resort which have directly addressed the question, and held that state courts are not required to entertain § 1983 actions to challenge state tax laws where taxpayers have (and here utilized) a plain, speedy and efficient remedy under state law; and where Petitioners can and do receive fully adequate redress of their grievances thereunder.

Neither, as Petitioners claim, is the decision below contrary to *Howlett v. Rose*, 496 U.S. 356 (1990). Here, unlike *Howlett*, the state court did not attempt to deny to Petitioners the substantive relief protected by § 1983—the right to challenge the State's tax laws and to obtain declaratory relief and refunds. Rather, that relief was *granted*—under state law. Petitioners' complaint is that, while they received the full measure of relief under state law to which they are constitutionally entitled, they didn't get the attorney fees they wanted. However, neither *Dennis* nor *Howlett* guarantees them the extra windfall they would like.

Finally, Petitioners suggest that the states' courts of last resort are "sharply divided" on the question. Not so. According to Petitioners, the "question" is only whether § 1983 protects taxpayers' rights to challenge state laws, and to obtain relief from those found to be unconstitutional or violative of federal law. It certainly does that. What Petitioners omit to acknowledge, however, and what the majority, if not all, state court decisions have held, is that where those rights are protected under state law, and that state law provides a remedy to redress taxpayers' grievan-

ces satisfactorily and adequately under the Constitution, the state courts are not required to look elsewhere for another, or additional, remedy.

The Petitioners have received all the relief to which they are entitled. The petition for a writ of certiorari should be denied.

STATE LAW HAS PROVIDED PETITIONERS AN INDEPENDENT, CONSTITUTIONALLY COMPLETE, AND ADEQUATE REMEDY IN THIS CASE, AND THE STATE COURT IS NOT REQUIRED TO ENTERTAIN A COEXTENSIVE FEDERAL LAW CLAIM WHERE STATE LAW PROVIDES THE REMEDY.

1. The decision below does not conflict with either *Dennis v. Higgins* or *Howlett v. Rose*, neither of which dealt with the issue involved here.

The Petitioners argue that the decision below conflicts with *Dennis v. Higgins* and with *Howlett v. Rose*. However, as the court below correctly observed:

> Neither *Dennis*, nor *Howlett*, addressed the issue of whether a state court should decline to impose federal remedies *when state remedies are adequate* and a federal court would, therefore, be prohibited from enforcing such remedies under the Tax Injunction Act.

879 P.2d at 140–141, Pet.App. at 7a. (Emphasis added.) In the footnote to this observation, the court also noted that the state law remedies provided here, a refund of the taxes wrongly exacted, interest on those amounts, and an injunction prohibiting the collection of such taxes in the future, fully satisfied due process requirements. *Ibid.*

As noted earlier, the Petitioners brought an action in state court under the provisions of OKLA. STAT. tit. 68, § 226 (1981) for declaratory and injunctive relief to challenge the constitutionality of certain state tax laws, and to obtain a refund of those taxes. Although unsuccessful at the trial level, the Petitioners prevailed on appeal to the Oklahoma Supreme Court. *Private Truck Council of America, Inc. v. Oklahoma Tax Com'n*, 806 P.2d 598 (Okla. 1990). In that decision, the Oklahoma Supreme Court declared the offending tax statutes unconstitutional because they violated the fundamental requirement of nondiscrimination against interstate commerce. *Id.*; *see also*, 879 P.2d 137, 138 (Okla. 1994), Pet.App. 2a–3a, *same case on remand.* The court further allowed a refund to Petitioners based upon the utilized state-law procedures, in accordance with this Court's decisions in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), and *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990). *Private Truck Council*, 879 P.2d at 139, Pet.App. 3a.

However, Petitioners, plaintiffs below, also sought attorney fees: under state law—which was denied—and under 42 U.S.C. § 1988. In its earlier opinion the state supreme court affirmed the dismissal of Petitioners' §§ 1983 and 1988 claim for attorney fees, giving as its reason its conclusion, under then extant law, that a Commerce Clause violation did not support a § 1983 claim. *See, Private Truck*, 879 P.2d at 139; Pet.App. 4a. It is that *reasoning* that was rejected in *Dennis*, not whether Petitioners are entitled to attorney fees.

Commensurate with this Court's remand order, the Oklahoma court asked the parties to brief, and considered, the following question: What is the effect of *Dennis v. Higgins* on Appellants' *coextensive state law claims*,

including Appellants' right to attorney's fees in this case? Pet.App. 60a. [Emphasis added]. After such consideration, and for the reasons given in the opinion below, the court correctly found that *Dennis* has *no* effect; it neither mandates nor authorizes attorney fees in this case.

It is important to note what *Dennis* decided—and what it did not. The *only* question presented or decided in *Dennis* was whether suits for violations of the Commerce Clause may be brought under 42 U.S.C. § 1983. *Dennis*, 498 U.S. at 440. While the Court held that such suits *may* be brought, the Court did not address, and did not decide, whether state courts are *required* to allow such suits, especially where an adequate remedy exists under state law, independent of and coextensive with the remedy provided by § 1983. *State v. Quill Corp.*, 500 N.W. 2d 196 (N.D. 1993), *cert. denied*, 114 S.Ct. 173 (1993).

In *Quill*, which the court below noted was "virtually identical to the case at bar," 879 P.2d at 140, Pet.App. at 6a, the petitioner (Quill) had been successful before this Court in its resistance on Commerce Clause grounds to the State's effort to require the collection of use taxes on interstate mail order sales. *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992). On remand, Quill sought attorney fees under § 1983 and § 1988 for vindication of its constitutional rights, but acknowledged, as here, that the state statutes provided it full relief from the unconstitutionality of the involved tax acts.

The *Quill* court, applying the reasoning of its earlier opinion in *Linderkamp v. Bismark School District No. 1*, 397 N.W.2d 76 (N.D. 1986), observed that the retailer had no cognizable federal civil rights claim under § 1983 to enjoin the collection of the offensive taxes because state law provided a plain, speedy and efficient remedy, and the retailer was thus not entitled to recover attorney fees

under § 1988. Quill's petition for certiorari in that case was denied. 114 S.Ct. 173 (1993).

Petitioners here also rely on *Howlett v. Rose*, 496 U.S. 356 (1990). However, as correctly observed in *State v. Quill* and by the court below, the issue in *Howlett* was entirely different, and directly opposite from the case at bar. In *Howlett*, this Court struck down a Florida decision that purported to extend a state sovereign immunity protection under state common law to an entity (school board) in a manner contrary to and directly at odds with § 1983. In this way, the state court attempted completely to deny the right of action which § 1983 protected. Here, however, the right of action and right to relief are *preserved and recognized under state law*—not defeated. As the court below correctly observed, its decision "is perfectly consistent with the federal interest." 879 P.2d at 141, Pet.App. at 8a.

2. The decision below does not conflict as to any federal question with the applicable decisions of state courts of last resort regarding the question presented, but is consistent with them.

Petitioners here argue that the courts of last resort of the various states are "sharply divided" on this question, and suggest a need for resolution. However, this is not a case of "exhaustion of remedies," nor of jurisdiction to hear § 1983 claims in state court. Nor, of course, is it an attempt to supplant the remedy of § 1983 with state law so as to afford less, constitutionally, than what § 1983 was designed to protect.

To the contrary, where tax challenges are concerned, a majority of state courts have held that where an independent and adequate state remedy exists to redress alleged

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constitutional violations, a § 1983 action or claim may not be maintained. The Supreme Court has not disagreed. As seen in *State v. Quill Corp.*, *supra*, a § 1983 action was not cognizable in state court and taxpayers were not entitled to attorney's fees under § 1988 because a full and adequate remedy was provided by state law. In *Spencer v. South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), *affirmed by an equally divided court*, 471 U.S. 82 (1985), it was held that a taxpayer may not circumvent state remedies through § 1983. *See also*, *Backus v. Chilivis*, 224 S.E.2d 370 (Ga. 1976) (§ 1983 not available where state law provides adequate remedy); *Davis v. City of Elkhorn*, 393 N.W.2d 95 (Wis. App. 1986) (same); *Johnston v. Gaston County*, 323 S.E.2d 381 (N.C. App. 1984) (same); *Linderkamp v. Bismark School Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986) (same); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. banc 1985) (same); *Vann v. DeKalb County Bd. of Tax Assessors*, 367 S.E.2d 43 (Ga. App. 1988) (same); *Ziska v. Water Pollution Control Authority*, 490 A.2d 509 (Conn. 1985) (same).

These cases have followed the reasoning of the federal courts that, because of principles of comity and the provisions of the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers may not challenge the validity of state tax systems through a § 1983 action in federal court, but "*must seek protection of their federal rights by state remedies*, provided of course that these remedies are plain, adequate, and complete." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981) (emphasis supplied). See, *Quill*, 500 N.W.2d at 202.

Although the Tax Injunction Act, by its terms, applies to federal courts and not to state courts, "it nonetheless points the way to the proper standard by which state tax challenges should be measured." *Ziska, supra*, 490 A.2d at

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513. Following that standard, "a majority of states that have considered the issue have held that a claim involving state taxes made pursuant to 42 U.S.C. § 1983 that would be barred in federal court because of the Tax Injunction Act should not be heard in a state court *if an adequate remedy with respect to the matter is otherwise available.*" *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292, 296 (Tenn. 1991) (Emphasis added).[6]

Although not a tax case, Oklahoma has adopted the same rule on similar reasoning—a § 1983 action may not be maintained for the deprivation of a constitutional right if *adequate and meaningful* State grounds for redress exist. *Wilhelm v. Gray*, 766 P.2d 1357, 1359 (Okla. 1988), *cert. denied*, 490 U.S. 1092 (1989). In *Wilhelm*, a man who had been arrested on Christmas Eve and jailed for several days on a recalled bench warrant, brought a § 1983 action against the court clerk for the clerk's allegedly negligent failure to notify the sheriff's office that the warrant had been recalled. The court observed that the Oklahoma Political Subdivision Tort Claims Act, 51 O.S. Supp. 1987, § 151 et seq., was "perfectly suited to providing redress for appellant's grievance," and could "fully compensate the appellant for the loss he has suffered." *Wilhelm*, 766 P.2d at 1360-61. Thus, concluding that "it is irrelevant that the appellant may not recover as much under the State

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[6] Finding the state remedy adequate, the Tennessee Supreme Court declined to recognize § 1983 jurisdiction. 817 S.W.2d, at 297. A year later, in *Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992) the court distinguished *L.L. Bean* and concluded that that taxpayer was entitled to utilize § 1983 and § 1988 to avoid the state law limitation on the *amount* of attorney fees to be awarded. This latter decision is correctly characterized by the North Dakota Supreme Court as "inexplicable." *Quill*, 500 N.W.2d at 200 n.2.

remedy as he could through § 1983," *Id.*, at 1359, the court held that "§ 1983 is unavailable as a means of redress for the wrongs alleged in this case." *Id.*, at 1361.[7]

Oklahoma's remedies under OKLA. STAT. tit. 68, § 226 for challenging the constitutionality of state tax systems are "perfectly suited to providing redress" in this case. In its original opinion herein the court characterized § 226 as an "all-in-one legal remedy," authorizing declaratory and injunctive relief, abatement of the challenged taxes, and a refund. 806 P.2d at 606. Likewise, the federal courts have reviewed Oklahoma's remedies, including § 226, and have declared them fully adequate for purposes of 28 U.S.C. § 1341, thereby precluding federal court jurisdiction. *Cities Service Gas Co. v. Oklahoma Tax Comm'n*, 656 F.2d 584, 587-88 (10th Cir.), *cert. denied*, 454 U.S. 1124, 102 S.Ct. 972 (1981); *Brooks v. Nance*, 801 F.2d 1237, 1240 (10th Cir. 1986).

By the reasoning of these decisions it is clear that Petitioners here were not and are not entitled to maintain an action under § 1983 in this case, and are not entitled to attorney fees under § 1988. The majority of state courts that have considered the question do not disagree. *Dennis* does not state or imply to the contrary. As observed in *Quill*, the majority in *Dennis* never discusses whether the state court had subject matter jurisdiction or whether there was a full and complete remedy at state law, and there can be no "implied holding" read into *Dennis* that prevents the court from refusing to entertain Petitioners'

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[7] *Wilhelm* is distinguishable from an earlier case, *Wilborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986), in which the remedy provided by § 1983 *was* allowed to be maintained where the remedies of the Tort Claims Act were unavailable because barred by the statute of limitations.

§ 1983 claim on these grounds. *Quill*, 500 N.W.2d at 202-203.

Although given and affirmed for a different reason, the dismissal of appellants' § 1983 claim and denial of their request for attorney's fees were correct, and should not be disturbed. *Cf.*, *Atlantic Richfield Co. v. State*, 659 P.2d 930, 934, n.10 (Okla. 1983); *Matter of Estate of Bartlett*, 680 P.2d 369, 374 (Okla. 1984).

As in *Spencer v. South Carolina Tax Comm'n*, *supra*, it is clear that the sole reason Petitioners in this case alleged § 1983 was to justify the allowance of an attorney fee which was not allowable under state law. As the court below said, however, "[n]o case . . . requires an attorneys' fee to be granted to satisfy due process requirements." 879 P.2d at 141 n.3, Pet.App. at 7a n.3. This attempt to circumvent state remedies by invoking § 1983 may not be permitted. *Spencer*, 316 S.E. 2d at 388-89.

CONCLUSION

The decision below is correct, and is not in conflict with the applicable decisions of this Court or those of the state courts of last resort that have addressed the question actually presented. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

STANLEY P. JOHNSTON
Deputy General Counsel
(Counsel of Record)
DAVID HUDSON
General Counsel
OKLAHOMA TAX COMMISSION
P. O. Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141
Counsel for Respondents

APPENDIX

OKLA. STAT. tit. 68, § 226 (1981):

(a) In addition to the right of appeal to the Supreme Court provided for in the preceding section, a right of action is hereby created to afford a remedy to any taxpayer aggrieved by the provisions of this article or of any other state tax law, or who resists the collection of or the enforcement of the rules or regulations of the Tax Commission relating to the collection of any state tax.

(b) Within thirty (30) days from the date of mailing to the taxpayer of the order, ruling or finding of the Tax Commission, any such taxpayer shall pay the tax to the Tax Commission, and at the time of making such payment shall give notice to the Tax Commission of his intention to file suit for recovery of such tax. If the taxpayer prevails the Tax Commission shall, by cash voucher drawn by the Tax Commission upon its official depository clearing account or special refund reserve account with the State Treasurer, refund to the taxpayer the amount of tax determined not to be due pursuant to the final judgment of the court having jurisdiction, together with interest on such amount at the rate of three percent (3%) per annum from the date of payment by the taxpayer to the date of the court's final order. The refunds paid shall be payable as provided in Section 225(d).

(c) This section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and the subject matter. It shall be construed to provide a legal remedy in the state or federal courts by action at law in cases where the taxes complained of are claimed to be an unlawful burden on interstate commerce, or the collection thereof violative of any Congressional Act

or provision of the Federal Constitution, or in cases where jurisdiction is vested in any of the Courts of the United States. In all actions brought hereunder service of process upon the Chairman of the Tax Commission shall be sufficient service, and the Tax Commission shall be the sole, necessary and proper party defendant in any such suit, and the State Treasurer shall not be a necessary or proper party thereto.

(d) Upon request of any taxpayer and upon proper showing that the principle of law involved in the assessment of any tax is already pending before the courts for judicial determination, the taxpayer, upon agreement to abide by the decision of the court, may pay the tax so assessed under protest, but need not file a suit.